



OFFICE OF LEGAL AFFAIRS
EXTERNAL OPINION

External Opinion # EX-2000-1020

To: David B. Neumeyer, Esq.
Executive Director
Virginia Legal Aid Society, Inc.
513 Church Street
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Date: November 6, 2000

Subject: 1618 Consultation Regarding 1604 Outside Practice of Law Application for Previous Practice Cases and the Definition of 'Consulting.'

Question Presented

Do either of the following activities violate the LSC Part 1604 prohibition on outside practice of law by recipient employed full time attorneys?

- 1) continued representation of a former private client for over three years after the beginning of the attorney's full time employment with the recipient,
- 2) services provided to a private law firm relating solely to factual and legal matters involved in the law firm's representation of a single client.

Summary

Under ordinary circumstances, a full time attorney employed by a recipient for over three years cannot continue to represent a former private client. The reasonableness of continued representation of former private clients under §1604.4(a) decreases with time and requires an increasingly strong showing of professional necessity for the required explicit approval from the recipient's Executive Director. The Executive Director has the discretion to grant or deny such requests consistent with an informed understanding of LSC regulations.

A full time attorney employed by a recipient cannot provided services to a private law firm relating solely to factual and legal matters involved in that firm's representation of a single client. Such services constitute prohibited outside practice of law under §1604.2(b), and are not considered 'consulting' by LSC.

Background

On October 24, 2000, you requested a consultation with the Legal Services Corporation (“LSC”) under 45 C.F.R. §1618.4(c) regarding LSC’s interpretation of 45 C.F.R. Part 1604—Outside Practice of Law in the following situations. In June of 1997, the Virginia Legal Aid Society (“VLAS”) hired a full time attorney. This attorney requested in writing at the time that he be allowed to continue with five private matters that “cannot be transferred at this time without prejudice to the client involved” June 11, 1997 Letter to David Neumeier. One of the matters involved an “attorney/client relationship with the medical expert for the defense.” *Id.* Regarding this matter, the attorney stated that “I would not anticipate this case taking very much time, but it will require that I take several days of leave, probably in the Fall [of 1997].” You approved this continued representation in June of 1997. As of October of 2000 this representation was still ongoing. According to your request, this attorney had not discussed this continued representation with you since June of 1997.

In July of 1999, this same attorney entered into a putative ‘Consulting Agreement’ with a private law firm. This agreement was for “consulting services which do not constitute the practice of law as [the law firm] may request relating to the [law firm’s] legal representation of [law firm’s client]” Consulting Agreement of July 30, 1999. The services to be provided include “briefing [the law firm] on previous transactions involving [the law firm’s client], acquainting [the law firm] with the business activities of [the law firm’s client], reviewing the technical aspects of scientific documents relating to environmental clean-up activities at the [law firm’s client’s] site, coordinating the work of any other technical consultants that may be retained . . . and evaluating the work and work product of environmental consultants retained by [the law firm’s client] or other parties involved in this matter.” *Id.*

In October of 2000, you first learned of this attorney’s putative ‘Consulting Agreement’ and other arrangements regarding that matter, and you requested a Part 1618 consultation with LSC regarding possible violations of Part 1604 by this attorney in these two matters.

Analysis

45 C.F.R. §1604.4(a) gives the director of a recipient the discretion to approve a full time attorney’s “outside practice of law for compensation” if the director determines, pursuant to §1604.3, that such practice is not “inconsistent with the attorney’s full time responsibilities [at the recipient]” and “the attorney is *newly employed* and has a professional responsibility to close cases from a previous law practices, *and does so as expeditiously as possible.*” Emphasis added.

The terms ‘newly employed’ and ‘as expeditiously as possible’ in this regulation are not defined and subject to reasonable interpretation in application. Nonetheless, after three years it is clear that an attorney is no longer ‘newly employed’ by a recipient. Similarly it is clear that three years does not, under most circumstances, qualify as closing a case ‘as expeditiously as possible.’ LSC recognizes that it may be possible in extreme and compelling circumstances that an attorney may not be able to extricate himself or herself completely from a case even after three years. Such circumstances do not appear to be present here though. It is well within your discretion, as the Executive Director of VLAS, to determine that this attorney did not comply with the requirement to close the case in question consistent with the regulation. LSC would expect any recipient attorney to at least keep the recipient’s Executive Director apprised of the status of any prior case that is not concluded soon after the attorney started full time employment at the recipient.

LSC most recently addressed the definition of the term ‘consulting’ in §1604.2 in OLA External Opinion 2000-1011 issued on May 16, 2000. In that opinion, OLA summarized LSC’s position as follows:

The term “consulting” is not defined in the regulations, but has been interpreted by LSC as “providing advice or sharing an expertise in a particular area of the law to other attorneys [or] in a law school setting, as long as [the] activities are not within an attorney-client relationship.” (LSC Op. Ltr., 1/25/99) In light of the strict statutory prohibitions on the outside practice of law imposed by Congress, this interpretation is intended to provide for a limited set of activities which can be considered “consulting.” Without a narrow interpretation of that term, an attorney could circumvent the statutory and regulatory prohibitions on the outside practice of law by labeling as consulting what would otherwise be understood to be legal representation. Among the factors involved in analyzing whether a particular activity can be considered to be consulting is the extent the prospective work will involve client representation and the extent to which the attorney’s services are sought for the attorney’s expertise in and knowledge of a particular subject. Moreover, consultants are generally “paid a contractual fee for their services by the attorney or firm providing representation to the client.” (LSC Op. Ltr., 7/29/97)

The referenced January 25, 1999, opinion letter concluded that work for a private lawyer assisting in specified client cases, although not involving direct representation of the client vis-a-vis third parties, does not constitute ‘consulting.’

Furthermore, in a September 2, 1994, opinion letter, OLA (then the Office of General Counsel) specified that “it makes sense to interpret the exception [for consulting]

to include only those consultations outside of a situation where an attorney is providing legal assistance to a *specific client for a particular matter.*” Emphasis added. The VLAS attorney in question clearly entered into an agreement to provide services directly involving an individual client. As per prior OLA opinion letters, this type of arrangement is not ‘consulting’ for purposes of §1604.2(b).

If you have any further question regarding this matter, please contact me at 202-336-8829 or mfreedman@lsc.gov.

Very truly yours,

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